TWO MORE STRIKES AGAINST VAGUE VAGRANCY ORDINANCES: PALMER v. EUCLID AND COATES v. CINCINNATI

In two recent decisions the United States Supreme Court reversed the convictions of defendants charged with violation of two vagrancy-type ordinances.[1] Although not landmark decisions, these two cases lend support to the increasing belief that laws invalidating essentially non-detrimental behavior are in conflict with the tenets of a democratic society. This note will discuss the ramifications of these and other decisions concerning the interrelationship of the investigative powers of the police vis à vis the personal liberties of the individual in the area of vagrancy legislation.[2]

The first part of this note will concentrate on the development of Ohio vagrancy law throughout the last century, and the impact of *Palmer v. Euclid* and *Coates v. Cincinnati* on this development. As was often the case in other areas of the law, the early Ohio decisions refused to disturb the actions of the legislature and upheld vagrancy laws on the basis of sovereign police power. But as the due process clause of the fourteenth amendment began to emerge as a more effective constitutional protection of of individuals, the courts began to revise their approach to vagrancy laws. *Palmer* and *Coates* join a long line of decisions adopting a later approach, and represent the present position of American vagrancy law.

The remainder of the note will consider the constitutional objections to vagrancy legislation. One of the Supreme Court's chief objections to the suspicious person ordinance of Euclid, Ohio, in *Palmer* and the loitering ordinance of Cincinnati, Ohio, in *Coates* was that both ordinances were unconstitutionally vague in that they failed to give men of ordinary intelligence fair notice of what constitutes unlawful conduct. However, even if vagrancy ordinances satisfy this "fair notice" requirement, many other constitutional guarantees must be safeguarded. For example, the laws must be written with sufficient specificity to avoid granting the police unfettered administrative discretion, and prevent the infringement of constitutionally permissible conduct as well. The desired result is a law which recognizes these constitutional limitations while not unduly restricting the investigative powers of the police.

I. PALMER V. EUCLID[3]

A. The Palmer Facts and Opinion

While patrolling the parking lot of an apartment complex in Euclid,

[1] Palmer v. Euclid, 402 U.S. 544 (1971); Coates v. Cincinnati, 402 U.S. 611 (1971). For purposes of this paper, terms such as "vagrancy ordinance" and "vagrancy legislation" will be limited solely to loitering and suspicious person laws.

[2] At the outset, the author expresses his thanks to Messrs. Niki Z. Schwartz and Joshua J. Kancelbaum, attorneys for Mr. Palmer, and Mr. Robert R. Lavercombe, attorney for Mr. Coates, who, through their Supreme Court briefs, provided information helpful in the research of this note.

[3] 402 U.S. 544 (1971).

Ohio, a policeman noticed Palmer's automobile proceeding at a slow rate of speed without headlights in the driveway of the parking lot. The policeman observed a "colored female" alight from the car and enter one of the apartment buildings. The patrolman's suspicion was aroused at this point since, as he alleged, he "knew" that no "colored females" resided at the building. Defendant Palmer then turned on his headlights before pulling his car onto the street to park. The patrolman followed Palmer, discovered him speaking over a two-way radio and thereupon requested that Palmer alight from his automobile and present his identification. Upon further investigation the patrolman failed to find any weapons. A thorough search of the apartment building also failed to locate the female, whose whereabouts Palmer claimed not to know. The patrolman then arrested Palmer and took him to the police station for further questioning, during which time Palmer gave three different addresses for himself and no satisfactory explanation of his purpose in going to the apartments beyond that of dropping off his friend.

Palmer was charged with violation of the suspicious person ordinance of Euclid, Ohio, which states in pertinent part:

> It shall be unlawful for any suspicious person to be within the Municipality. The following shall be deemed suspicious persons:
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> . . . .
>
> (e) Any person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself;[4]

At trial, Palmer's cross-examination[5] of the arresting officer resulted in the disclosure that there was no evidence of any substantive crime committed by either Palmer or his female friend and, in fact, no crime at all had been reported for that evening at or near the apartment complex. However, the jury found Palmer guilty of being a suspicious person, and the court sentenced him to 30 days in jail and fined him $50.

After Palmer's appeals to the Court of Appeals for Cuyahoga County and the Supreme Court of Ohio, the United States Supreme Court noted probable jurisdiction[6] and heard the case. In a brief opinion the Supreme Court reversed Palmer's conviction, and held: . . . "[T]he ordinance is so vague and lacking in ascertainable standards of guilt that, *as applied to Palmer*, it failed to give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.' "[7] In a joint concurring opinion, Justices Stewart and Douglas stated that the Court should have

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[4] EUCLID, OHIO, ORDINANCE § 583.01 (1960).

[5] Although not an attorney, Palmer conducted his own defense at the trial.

[6] 397 U.S. 1073 (1970).

[7] 402 U.S. 544, 545 (1971) (emphasis added), *citing* United States v. Harriss, 347 U.S. 612, 617 (1954).

held the ordinance unconstitutionally vague on its face.[8] By adopting the narrower holding that the ordinance was merely unconstitutional as applied to the defendant, the majority refused to consider the broader issue — whether suspiciousness per se may be designated as a crime.

B. *Ohio Decisions Concerning the Validity of Suspicious Person Ordinances — From Morgan to Thompson*

Prior to the 1960's the Ohio courts had little compunction in upholding convictions based on vagrancy laws. But as courts throughout the country began to focus to a greater extent on the rights of the accused, Ohio joined in the trend and adopted a more liberal approach toward such legislation. This transition was not unanimously approved by all Ohio courts; some even had difficulty reaching consistent decisions from one case to the next.

The earliest Ohio case on the topic of municipal vagrancy ordinances is *Morgan v. Nolte*.[9] Although the ordinance in *Morgan* was not specifically termed a "suspicious person" ordinance, the subject matter of the ordinance encompassed the inherently suspicious class designated as "known thieves." The basic question presented in *Morgan* was whether the city council of Cincinnati was authorized to create the offense of which the defendant was convicted. The city council in enacting the statute had relied on § 2108 of the Ohio Revised Statutes.[10] The court had first to decide whether the enactment of the statute was within the power conferred upon the general assembly. Deciding against the accused on both questions, the court held:

> The only limitations to the creation of offenses by the legislative power, are the guarantees contained in the bill of rights, neither of which is infringed by the statute in question. It is a mistake to suppose that offenses must be confined to specific acts of commission or omission. A general course of conduct or mode of life which is prejudicial to the public welfare may likewise be prohibited and punished as an offense.[11]

In 1962 the Ohio Supreme Court began to alter its view toward suspicious person laws. In *Columbus v. DeLong*[12] the court held that an

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[8] 402 U.S. 544, 546 (1971).

[9] 37 Ohio St. 23 (1881).

[10] An all-inclusive statute, OHIO REV. STAT. § 2108 (1880), provided that the cities shall have the power:

> [T]o provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watchstuffer, ballgame player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself. *Id.* at 24.

[11] 37 Ohio St. 23, 25 (1881). The Ohio courts have considered similar vagrancy ordinances in Welch v. Cleveland, 97 Ohio St. 311, 120 N.E. 206 (1917), *In re* Opal Howard, 15 Ohio C.C.R. (n.s.) 171 (1912), and Bader v. McCartin, 6 Ohio App. 76 (1915). These cases were also disposed of on the question of improper delegation of power, and a discussion of them adds little to the analysis presented here.

[12] 173 Ohio St. 81, 180 N.E.2d 158 (1962).

ordinance making it a criminal offense for a prostitute merely to wander the streets was an unauthorized exercise of the city's police power. The court based its decision on two grounds: (1) the ordinance was too indefinite; and, (2) the ordinance was too restrictive. "After all, a prostitute, no matter how reprehensible her mode of life, is a human being with rights protected by the Constitution, and by merely wandering, without more, she commits no criminal offense."[13]

Yet *DeLong* confuses rather than clarifies the Ohio Supreme Court's disposition toward vagrancy ordinances. The court recognized that its decision conflicted with *Morgan* and *Welch*, but it attempted to distinguish these cases on the ground that "the terminology of the ordinance" in *DeLong* was different. But the court did not explain the way in which it was different.[14] Ohio courts, therefore, are left with no clear guidelines on which to base a determination of what terminology constitutes lawful as opposed to unlawful exercise of police power.

The first significant attack on suspicious person ordinances occurred in 1967 in the Cleveland Municipal Court case of *Cleveland v. Forrest*.[15] In previous cases (*Morgan, Welch, and Howard*) the defendants assailed such ordinances on the ground that they were an unlawful exercise of delegated power. *Forrest* was the first case which focused on basic constitutional principles. The court invalidated the ordinance on fourth and fifth amendment grounds. On the fourth amendment ground the court announced that the investigative powers of the police must be balanced with "the necessity that citizens be secure in their persons against seizure without probable cause."[16] The court indicated that the ordinance in question unfairly favored the police by allowing them to make searches without probable cause. On the fifth amendment ground the court stated:

> It cannot now be doubted that the police power of a municipality does not extend to permit the *compulsory* interrogation of persons. Indeed, the Supreme Court of the United States has through a series of decisions defined procedures which must be followed in the pursuit of this police power. . . . To require a citizen to reasonably and satisfactorily account for his presence upon the public streets offends the right to silence guaranteed by the Fifth Amendment.[17]

Forrest was a municipal court case, and of course not binding on the Supreme Court of Ohio, but in line with *Forrest* the supreme court was soon to take a more negative view of suspicious person ordinances. Four years after *Forrest* and five months prior to the United States Supreme Court's decision in *Palmer*, the Ohio Supreme Court, in *Columbus v.*

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[13] *Id.* at 83, 180 N.E.2d at 160.

[14] *Id.*

[15] 39 Ohio Op. 2d 203, 223 N.E.2d 661 (Cleveland Mun. Ct. 1967).

[16] *Id.* at 206, 223 N.E.2d at 665.

[17] *Id.* at 205, 223 N.E.2d at 664.

Thompson,[18] considered a challenge to a suspicious person ordinance identical to the Euclid ordinance in *Palmer*. Although the appellant attacked the ordinance on the same grounds asserted in *Forrest*, the *Thompson* court adopted a wholly different rationale. The court did not discuss the fourth amendment right against unreasonable searches and seizures, or the fifth amendment privilege against self-incrimination, but rested its decision solely on the fourteenth amendment due process clause. The court may have foreseen that its decision in *Palmer* might be overturned by the United States Supreme Court, for it adopted the same rationale in *Thompson* as the Supreme Court later employed in *Palmer*.

> We conclude, and so hold, that this portion of the ordinance lacks "ascertainable standards of guilt" and is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[19]

Thus two 1971 cases have struck down convictions based on suspicious person ordinances: The highest court in the land held one unconstitutional as applied; the highest court of the state of Ohio held the other unconstitutional on its face. Certainly the judicial future of suspicious person ordinances is gloomy.

II. COATES V. CINCINNATI — THE LOITERING ORDINANCE

A. *The Coates Facts and Opinion*

Neither the record of *Coates v. Cincinnati*[20] nor the briefs of the appellants and appellee reveal much of the factual situation of this case.[21] Basically, the defendants-appellants were a student (Coates) involved in a demonstration and pickets involved in a labor dispute. All the defendants were arrested under the loitering ordinance of Cincinnati, Ohio, which provides:

> It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings.[22]

All defendants were found guilty and their convictions were affirmed by the Ohio Supreme Court.[23] The United States Supreme Court noted probable jurisdiction[24] and heard the case.

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[18] 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

[19] *Id.* at 33, 266 N.E.2d at 575.

[20] 402 U.S. 611 (1971).

[21] Because appellants' only position was that the ordinance *on its face* violated the first and fourteenth amendments, a lengthy discussion of the facts is unnecessary.

[22] CINCINNATI, OHIO, CODE § 901-L6 (1956).

[23] 21 Ohio St. 2d 66, 255 N.E.2d 247 (1970).

[24] 398 U.S. 902 (1970).

The United States Supreme Court determined that, as the ordinance in *Palmer*, the ordinance in *Coates* was unconstitutionally vague in that it specified no standard of prohibited conduct. The Court held the ordinance unconstitutional on its face, and discussed three other constitutional infirmities of the ordinance to support its decision: (1) the ordinance conferred unfettered discretion to police officers, thus inviting discriminatory enforcement; (2) it made criminal actions which could not constitutionally be connoted a crime; and, (3) it violated the constitutional right of free assembly and association. Thus *Coates* has far greater precedential value than does *Palmer*, and it will presumably cause numerous repeals of loitering ordinances now in effect.

B. *Ohio Decisions Concerning Loitering Ordinances*

In reversing the convictions in *Coates* the United States Supreme Court rejected the rationale of the Supreme Court of Ohio, which had interpreted the ordinance according to its apparent meaning without applying any narrowing construction.[25] The Ohio court had written a very terse opinion in which it failed to cite any Ohio cases supporting its decision. There may be a good reason for this approach, for Ohio case law has almost universally struck down such ordinances.

Ten years prior to the Ohio Supreme Court's decision in *Coates* three lower Ohio courts had determined that ordinances strikingly similar to the one in *Coates* were unconstitutional on their face. In *Toledo v. Sims*,[26] the Municipal Court of Toledo declared a loitering ordinance of Toledo unconstitutional on the grounds that it impaired the defendants' right of assembly and that it granted the police absolute discretion in determining whom to arrest. Although the Ohio Supreme Court in *Coates* had observed that the word "annoy" presented no constitutional problem, the *Sims* court expressed a different viewpoint:

> Neither the Constitution of the United States nor the Constitution of Ohio limit the rights of any of its inhabitants to congregate or assemble upon conditions of person, place or purpose, *or subject to annoyance or complaint of others* who have granted and are subject to the same constitutional rights and duties, whether they be neighbors or public officials, organized or unorganized.[27]

The *Sims* court relied to a considerable extent on the then four month old case of *Cleveland v. Baker*.[28] The *Baker* majority struck down a typical

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[25] The Ohio Supreme Court concluded that the ordinance: "clearly and precisely delineates its reach in words of common understanding. It is a 'precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be . . . proscribed.'" 21 Ohio St. 2d at 69, 255 N.E.2d at 249.

[26] 14 Ohio Op. 2d 66, 169 N.E.2d 516 (Toledo Mun. Ct. 1960).

[27] *Id.* at 68, 169 N.E.2d at 518 (emphasis added).

[28] 83 Ohio L. Abs. 502, 167 N.E.2d 119 (Ct. App. 1960).

loitering ordinance adopting the rationale employed in *Sims*, and added: "An ordinance which forbids an act in terms so vague that men of common intelligence and understanding must guess as to its meaning and differ as to its application violates the first essential of due process of law."[29]

Although this decision of the Court of Appeals for Cuyahoga County (adopting the identical rationale later employed by the United States Supreme Court in *Coates*) had been decided 10 years prior to the Supreme Court of Ohio's decision in *Coates*, the Ohio Supreme Court completely ignored it in upholding a very similar ordinance.

In *Akron v. Effland*,[30] the third 1960 case regarding loitering ordinances, the Court of Appeals of Summit County held an ordinance unconstitutional on the ground that it was an arbitrary and unreasonable exercise of the city's right to enact local legislation. The court found the ordinance unreasonable on the ground that there was no saving or justification clause which would apply to individuals justifiably tarrying on the public streets. Accordingly, one who is merely window shopping or waiting for an acquaintance could be convicted for violation of the ordinance. Clearly such a conviction would be unconstitutional.[31]

Though these Ohio and Supreme Court decisions indicate a current wave of disfavor toward vagrancy laws, it appears that the issue is not yet fully settled. For example, the fact that the Ohio Supreme Court retreated from *DeLong* in *Coates*, and then within one year returned to its former viewpoint in *Thompson* indicates the difficulties of the court in formulating a fixed rule in this area of the law. Even more arcane is the seemingly inconsistent action of the United States Supreme Court in holding *Coates* unconstitutional on its face while deciding that *Palmer* was merely unconstitutional as applied, even though the two cases were decided within weeks of each other and the same legal principles were applicable to both. Whether or not this approach indicates the courts' lack of certainty in the invalidity of vagrancy laws awaits further judicial clarification, and is beyond the scope of this note. However, because of the prevailing national concern for increased law and order, and the apparent relative conservatism of the present Supreme Court, it is possible that *Coates* and *Palmer* will not go unchallenged in future litigation. Because of these factors, the objections to vagrancy laws must be crystallized into clear and precise rules

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[29] *Id.* at 504, 167 N.E.2d at 121.

[30] 15 Ohio Op. 2d 341, 174 N.E.2d 285 (Ct. App. 1960).

[31] *See, e.g.*, Cleveland v. Anderson, 13 Ohio App. 2d 83, 234 N.E.2d 304 (1968), in which the court reversed a conviction based on violation of a loitering ordinance on the ground that it failed to give fair notice of what conduct it proscribed. Interestingly, the *Anderson* opinion was written by Judge Corrigan, who two years later reached an opposite conclusion in writing the majority opinion for the Ohio Supreme Court in Cincinnati v. Coates, 21 Ohio St. 2d 66, 255 N.E.2d 247 (1970). Again in 1971, he altered his view in striking down a suspicious person ordinance in Columbus v. Thompson, 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

of constitutional law in order to withstand the pressures of those advocating further promulgation and enforcement of vagrancy legislation.

III. Constitutional Objections to Vagrancy Ordinances

The remainder of this note will discuss objections to vagrancy ordinances, some of which were adopted by the Court in *Palmer* and *Coates*. As will become apparent, some of these objections apply more readily to suspicious person ordinances, such as the self-incrimination argument, and some are more closely connected to loitering ordinances, such as the freedom of movement and right of assembly arguments. However, all of these objections originate from the vagueness doctrine, which has historically been recognized by courts and commentators as the chief infirmity of such ordinances.[32]

Generally, the vagueness doctrine is founded upon three distinct yet similar policies: (1) an ordinance may be vague in that it fails to give fair notice of what conduct is prohibited;[33] (2) it may be vague in that law enforcement officers are given unbridled discretion in administering it;[34] and, (3) the vagueness may invite infringement of constitutionally protected rights.[35]

A. *Fair Notice*

The "fair notice" aspect of the vagueness doctrine was the sole ground for reversal in *Palmer*.

> Palmer could reasonably be charged with knowing that he was on the streets at a late or unusual hour and that denying knowledge of his friend's identity and claiming multiple addresses amounted to an unsatisfactory explanation under the ordinance. But in our view the ordinance gave insufficient notice to the average person that discharging a friend at an apartment house and then talking on a car telephone while parked on the street was enough to show him to be "without visible or lawful business."[36]

In *Coates* the Court held:

> The ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.[37]

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[32] Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205 (1967); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

[33] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

[34] Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

[35] NAACP v. Button, 371 U.S. 415 (1962).

[36] 402 U.S. 544, 545-46 (1971).

[37] 402 U.S. 611, 614 (1971).

The best approach in reviewing the "fair notice" requirement, and how it may be violated by ordinances such as in *Palmer* and *Coates*, is to examine the particular words of each ordinance and determine the way in which these words offend the requirement. For example, the Cincinnati ordinance involved in *Coates* contained the word "annoy." The Supreme Court commented:

> Conduct that annoys some people does not annoy others . . . [The city cannot prohibit antisocial conduct] through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.[38]

No standard is established by which an individual may know what conduct is annoying, and a determination cannot be made until a complainant causes an arrest. Neither the police nor a citizen can possibly conduct himself in a lawful manner unless an ordinance designed to regulate conduct contains ascertainable guidelines to govern its enforcement.[39] An ordinance lacking these guidelines is violative of the fifth and fourteenth amendment due process clauses.[40]

Anyone could become an unwitting violator of such ordinances since conviction could be authorized simply because a sensitive onlooker of an assemblage is annoyed by some incidental attribute of one of the participants, or more likely, by the tone of one's speech. Certainly a conviction based on a rule prohibiting annoying speech would violate the first amendment. The very purpose of the first amendment is to provoke discussion and stimulate the dissemination of novel viewpoints, which quite often creates disturbances.[41] If the controversial cannot be spoken, people hear only one side of every issue and are thereby deprived of the opportunity to formulate their own ideas.

The ordinance in *Palmer* contains even more vague terminology. For instance, the term "wanders" is incomprehensible as a guide for the governance of conduct. The Ohio Supreme Court has twice invalidated ordinances containing this word for failing to provide fair notice. In *Columbus v. DeLong*[42] it was held that since the term "wandering" — as used in an ordinance directed at prostitutes — is commonly interpreted to mean "to

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[38] *Id.*

[39] Cleveland v. Anderson, 13 Ohio App. 2d 83, 234 N.E.2d 304 (1968). *But see* Cleveland v. Denney, 89 Ohio L. Abs. 312 (Cleveland Mun. Ct. 1962), which upheld the validity of a new ordinance enacted by the city of Cleveland after the previous ordinance was struck down in *Cleveland v. Baker*, 83 Ohio L. Abs. 502, 167 N.E.2d 119 (Ct. App. 1960). Although the court agreed with the accused that the word "annoyance" as used in the ordinance was in the form of a conclusion, the court felt that the use of the adjective "serious" modifying "annoyance" sufficiently clarified the type of offense, enabling the police to be guided by standards, rather than by discretion.

[40] Coates v. Cincinnati, 402 U.S. 611 (1971).

[41] Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[42] 173 Ohio St. 81, 180 N.E.2d 158 (1962).

move about without a fixed course, aim, or goal,"[43] the word is not connotative of criminal intent, and the ordinance therefore was an unconstitutional prohibition of innocent conduct. And in *Columbus v. Thompson*[44] the court relied on *DeLong* in holding that the term "wandering" was "too indefinite, restrictive, and liberty-depriving to satisfy due process requirements."[45]

Obviously the legislatures do not intend to prohibit innocent conduct by means of these ordinances, but vaguely worded ordinances could easily encompass such activities as window shopping, sitting in a park, or merely taking a walk.[46] "The ordinance(s) make no distinction between conduct calculated to harm and that which is essentially innocent."[47]

In *Thompson*[48] the appellee (City of Columbus) argued that although "wandering" may be too indefinite, when it is considered with the qualifying language of the ordinance indicating that the only individual who will be arrested for wandering is one "who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give (a) satisfactory account of himself,"[49] then the ordinance satisfies due process requirements. The court rejected this argument by citing the Massachusetts case of *Alegata v. Commonwealth*,[50] in which it was noted:

> Being abroad in the nighttime no more imports sinister conduct than does the act of sauntering and loitering proscribed by the ordinance held to be invalid in Commonwealth v. Carpenter, 325 Mass. 519. Yet the statute literally applies to *all* persons, however innocent their conduct may be, who are abroad at night, arouse the *suspicion* of a police officer, and, subsequently, fail to *give a satisfactory account*. It is hard to see how suspicion of unlawful design or failure to give a satisfactory account, without more, can transform otherwise innocent behavior into a crime. Suspicion, which is an inadequate ground for arrest, is no more satisfactory as a basis for punishment.[51]

Numerous courts have struck down vagrancy ordinances on the basis of the many unanswered questions which they contain. For instance: "Is it constitutional to place the burden on the accused of justifying his presence by means of the requirement of a satisfactory explanation?"[52] Fur-

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[43] *Id.* at 83, 180 N.E.2d at 161.

[44] 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

[45] *Id.* at 31, 266 N.E.2d at 574.

[46] State v. Caez, 81 N.J. Super. 315, 195 A.2d 496 (1963); Akron v. Effland, 112 Ohio App. 15, 174 N.E.2d 285 (1960); Soles v. Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966); Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 4 (1960).

[47] Seattle v. Drew, 70 Wash. 2d 405, 410, 423 P.2d 522, 525 (1967).

[48] 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

[49] *Id.* at 31, 266 N.E.2d at 574.

[50] 353 Mass. 287, 231 N.E.2d 201 (1967).

[51] *Id.* at 292, 231 N.E.2d at 204.

[52] *See, e.g.*, Cleveland v. Forrest, 39 Ohio Op. 2d 203, 205, 223 N.E.2d 661, 664 (Cleveland Mun. Ct. 1967).

thermore, since the word "satisfactory" is not susceptible of any standard of exactness, will an extremely dubious but truthful account be sufficient? A credible but false account? When may an account be demanded, and how much of an explanation is needed to suffice as an account?[53] Must a satisfactory account encompass both past and present activity? That is, how far back in time must the accused justify his conduct? If the account includes past activity, is this guilt without proof?[54] Also, must the account be morally or legally satisfactory?[55] Must the account put the accused above suspicion or must it merely give the officer sufficient credible information so as to negate probable cause?[56] And what independent investigation, if any, must the arresting officer make before relying on hearsay?[57]

Finally, assuming the accused refuses to give any explanation, or is unable to give one, is he then presumed to be guilty? Courts and commentators believe that such a conclusion would result in a violation of the fifth amendment right to silence.[58] Speaking on the principle of presumptive guilt, the United States Supreme Court has held:

> [A] statutory presumption cannot be sustained if there be no rational connection between fact proved and ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.[59]

In applying this test to a suspicious person ordinance, another court reasoned:

> The failure to give a good account . . . cannot reasonably be equated with the term "unlawful." Many things may not be "good," but it does not follow that they are necessarily unlawful; moreover, many things may be lawful, but they may be less than good.[60]

B. *Administrative Discretion*

The vagueness of the law not only creates "fair notice" difficulties, it also places unduly broad discretion into the hands of law enforcement officials, thus decreasing the possibility of even-handed justice.[61] One critic has commented:

> It takes little imagination to perceive that the "reasonable account" (or

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[53] *See, e.g.*, Scott v. District Attorney, 309 F. Supp. 833, 837 (S.D.N.Y. 1970).

[54] *See, e.g.*, Baker v. Bindner, 274 F. Supp. 658 (W.D. Ky. 1967).

[55] *See, e.g.*, United States v. Margeson, 259 F. Supp. 256, 268 (E.D. Pa. 1966).

[56] *See, e.g.*, Ricks v. District of Columbia, 414 F.2d 1097, 1106 (D.C. Cir. 1968).

[57] Landry v. Daley, 280 F. Supp. 968, 971 (N.D. Ill. 1968).

[58] Columbus v. Thompson, 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971); Alegata v. Commonwealth, 353 Mass. 287, 231 N.E.2d 201 (1967). *Contra*, People v. Merolla, 9 N.Y.2d 62, 172 N.E.2d 541 (Ct. App. 1961). *See also* p. 920 *infra* (discussion on self-incrimination).

[59] Tot v. United States, 319 U.S. 463, 467-68 (1943).

[60] United States v. Margeson, 259 F. Supp. 256, 269 (E.D. Pa. 1966).

[61] Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101, 110.

"good account" or "satisfactory account") requirement of the ordinary vagrancy law operates simply as a charter of dictatorial power to the policeman.[62]

The Supreme Court has reached this conclusion a number of times. In the 1965 case of *Shuttlesworth v. Birmingham*,[63] the Supreme Court invalidated an ordinance which made it a crime for anyone to loiter after having been requested by a police officer to disperse. The Court objected to this arbitrary standard because it "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."[64] Accordingly, as an unconstitutional suppression of first amendment rights, the ordinance bore "the hallmark of a police state."[65]

In *Cox v. Louisiana*[66] the Court recognized that to allow public officials to determine which expressions will be allowed and which will not "sanctions a device for the suppression of the communication of ideas and permits the official to act as censor."[67]

This constitutional rule is not limited to cases involving speech or speech-related matters. It applies to any of the "freedoms which the Constitution guarantees"[68] and has even been extended to include any "right or privilege."[69] Outside the first amendment cases,[70] the rule has enjoyed its widest application where the freedom to choose one's own living was at issue.[71]

It is uncertain how far the Court will go in striking down vagrancy ordinances on the ground that they confer undue discretion to police officers. While it may be difficult to enact more specific and narrow ordi-

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[62] Amsterdam, *supra* note 32, at 223.

[63] 382 U.S. 87 (1965).

[64] *Id.* at 90, *citing* separate opinion of Mr. Justice Black in Cox v. Louisiana, 379 U.S. 536, 579 (1965).

[65] *Id.* at 90-91.

[66] 379 U.S. 536, 557 (1965).

[67] *Id.* at 557.

[68] Staub v. Baxley, 355 U.S. 313, 322 (1958).

[69] Smith v. Ladner, 288 F. Supp. 66, 68 (S.D. Miss. 1968).

[70] *See, e.g.*, the so-called "permit" cases. The principle of cases such as Cox v. Louisiana, 379 U.S. 536 (1965), Staub v. Baxley, 355 U.S. 313 (1958), Kunz v. New York, 340 U.S. 290 (1951), and Niemotko v. Maryland, 340 U.S. 268 (1951), is as follows: If an ordinance requires an individual to obtain a permit before he may use public facilities for parading or protesting purposes, and if the ordinance contains no standards to direct administrators in applying the ordinance, then if the individual requests a permit and the city officials refuse his request, he may legally conduct his parade or rally without the permit.

On the other hand, the rule of Poulos v. New Hampshire, 345 U.S. 395 (1953) is that if the ordinance is valid on its face in that it prescribes an ascertainable standard of conduct for city officials in administering a permit system, but the individual is denied a permit because of the arbitrary and discriminatory application of the ordinance by city officials, then the individual is not free to conduct his meeting without the permit, but must first obtain judicial review of the unlawful denial of the permit.

[71] Yick Wo v. Hopkins, 118 U.S. 356 (1886); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); State v. Allstate Ins. Co., 231 Miss. 869, 97 So. 2d 372 (1957).

nances than presently exist without completely curtailing the investigative powers of law enforcement officers,[72] Judge Skelly Wright's admonition in *United States v. Matthews*[73] echoes a caveat not to be lightly brushed aside:

> The discretion that today is widely employed may become the basis of prejudice and discrimination tomorrow. Moreover, innumerable studies of civil disorders in Negro communities have demonstrated that those disorders are in large measure due to the abuse of discretion by law enforcement officials.[74]

Judge Wright's hesitancy in upholding the validity of discretionary ordinances is well-founded. F.B.I. statistics reveal that there is a disproportionate amount of arrests of blacks for vagrancy-type offenses (45.3 percent) compared to total arrests (27.5 percent).[75] Another study has shown that black youths arrested for minor offenses are given more severe dispositions after arrest than white youths.[76] Many other reports have found that on the whole, law enforcement officials are much more wary of black suspects than they are of whites.[77] In fact, the enforcement of the loitering ordinance in *Coates* had a prominent effect on the serious civil disturbance that occurred in Cincinnati in the summer of 1967.[78]

However, blacks are not the only people discriminated against by such ordinances. The individual attired in "dirty, ragged clothes",[79] the person who does not "belong" where he is observed, and the poor, are particularly susceptible to police interrogation. These phenomena were evident as early as 1931 when the court in *Territory of Hawaii v. Anduha*[80] commented: "It [a loitering regulation] may be enforced to suppress one class of idlers in order to make a place more attractive to other idlers of a more desirable class."[81]

C. *Infringement of Constitutionally Protected Conduct*

Closely associated with the administrative discretion and "fair notice" prohibitions is the rule that a vague statute or ordinance construed to punish

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[72] Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 571 (1960).

[73] 419 F.2d 1177 (D.C. Cir. 1969) (dissenting opinion).

[74] *Id.* at 1195.

[75] F.B.I., UNIFORM CRIME REPORTS—1968, Table 30, at 120.

[76] Piliavin and Briar, *Police Encounters with Juveniles*, 70 AM. J. OF SOC. 206 (1964).

[77] *See, e.g.*, P. TIFFANY, D. MCINTYRE, and D. ROTENBERG, DETECTION OF CRIME (1967); Kadish, *Legal Norms and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); LaFave, *The Police and Non-enforcement of the Law—Part I*, 1962 WIS. L. REV. 104; Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

[78] Coates v. Cincinnati, 402 U.S. 611, 616 n. 6 (1971).

[79] T. GILSTON and J. PODELL, THE PRACTICAL PATROLMAN (1959).

[80] 48 F.2d 171 (9th Cir. 1931).

[81] *Id.* at 173.

constitutionally protected conduct is invalid to the extent that it fails to give adequate warning of the boundary between constitutionally permissible and constitutionally impermissible applications. The Supreme Court has noted that "an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."[82] The remainder of this note will be devoted to a consideration of these freedoms.

1. Freedom of Assembly

Any legislative attempt to abrogate freedom of assembly is prohibited by the Constitution even though the legislation is ostensibly motivated by a desire to insure peace and order in the community.[83] In *Coates* the Court held that "mere public intolerance or animosity cannot be the basis for abridgement"[84] of the right of free assembly and association. Although not commented upon by the Court, it could be argued that the Cincinnati ordinance in *Coates* also contained two indirect violations of this Constitutional right. The first is the provision in the ordinance which approves "annoying" behavior at a "public meeting of citizens" but permits criminal conviction for "annoying" behavior under all other circumstances.[85] The ordinance does not inform a group of "three or more persons" as to whether their particular gathering constitutes such a "public meeting" and excepted from the operation of the ordinance.

In the past the Ohio courts have been seemingly predisposed to invalidate ordinances forbidding annoying assemblages. Ordinances prescribing restrictions on Halloween celebrants,[86] socialist sympathizers,[87] businessmen,[88] and barking dogs[89] have all been held invalid. In *Sims* the court described how the operation of such ordinances centuries ago would have curtailed the development of democratic societies.

> Under the provisions of Sections 17-5-10 and 17-5-11, arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester

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82 Staub v. Baxley, 355 U.S. 313, 322 (1958).

83 Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S. 88 (1940).

84 402 U.S. 611, 615 (1971).

85 *Id.* at 611 n. 1.

86 Deer Park v. Schuster, 16 Ohio Op. 485 (C.P. 1940).

87 Cleveland v. Anderson, 13 Ohio App. 2d 83, 234 N.E.2d 304 (1968).

88 Toledo v. Sims, 14 Ohio Op. 2d 66, 169 N.E.2d 516 (Toledo Mun. Ct. 1960).

89 Columbus v. Becher, 173 Ohio St. 197, 180 N.E.2d 836 (1962).

> Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoyance of Governor Dunsmore and his colonial constables.[90]

The second infirmity in the Cincinnati ordinance is that it allows guilt by association. This is best demonstrated by the unreported case of *Cincinnati v. Johnson*, a 1968 Ohio case which interpreted the same ordinance which was later held unconstitutional in *Coates*. Johnson's arrest and conviction arose as the result of civil disturbances in Cincinnati during the summer of 1967. The evidence showed that a formation of police officers advanced toward a group of angry people and ordered them to disperse. The entire crowd moved back, with the exception of Johnson, who remained standing on the sidewalk. The evidence also revealed that Johnson was a professional social worker whose purpose in going to the troubled area was to assist in preserving order. The Court of Appeals for Hamilton County reversed Johnson's conviction. Although the court had serious doubts as to the constitutionality of the ordinance, it deferred any resolution of that issue and confined its holding to a failure of proof. The court pointed out that since the evidence did not establish that Johnson had annoyed anyone (except possibly the arresting officer), the prosecution's case was built entirely on proof by imputation. The court said that although the mob as a whole conducted themselves in a manner so as to violate the ordinance, to find Johnson a part of the mob would require the application of guilt by association — a principle unequivocally rejected by the court.

2. Freedom of Movement

Although the *Coates* and *Palmer* courts, while confronting the validity of vagrancy ordinances, were silent on the issue of the freedom of movement, other cases imply that such ordinances violate this constitutional right. Because freedom of movement embodies the same considerations as freedom of assembly,[91] many of the principles regarding freedom of assembly are also applicable to freedom of movement. For instance, the Court noted in *Cox v. Louisiana*[92] that the government does have the right to control travel on the streets, but specified that this right is subject to certain limitations: namely, the restriction must be "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application. . . ."[93] But in illustrating this rule the Court directed its attention to extreme examples, merely pointing out the obvious: One may not ignore a red light or other traffic regulations, one may not

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[90] 14 Ohio Op. 2d 66, 69, 169 N.E.2d 516, 520 (Toledo Mun. Ct. 1960).

[91] *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

[92] 379 U.S. 536 (1965). *See also* Hague v. CIO, 307 U.S. 496, 515 (1939).

[93] 379 U.S. 536, 554 (1965).

conduct a street meeting in the middle of Times Square at rush hour, and a group of demonstrators may not cordon off a street or block the entrances to buildings.[94] The Court failed to cite neutral conduct, such as whether the government has the right to impede someone's movement merely because he is loitering or looks suspicious.

Beyond these civil rights cases, there are numerous decisions directly confronting the freedom of movement. In *Kent v. Dulles*,[95] the right of a member of the Communist Party to obtain a passport was at issue. Upholding this right the Court stated that "[t]he right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement is basic in our scheme of values."[96] Quoting extensively from Chafee,[97] the Court recalled that "[o]ur nation . . . has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, to do what he pleases, go where he pleases."[98] Although this right is not specifically granted by the Constitution, the Court has never held that the Bill of Rights or fourteenth amendment protect only those rights that the Constitution explicitly mentions.[99] And in *Edward v. California*[100] the concurring opinion of Mr. Justice Douglas revealed that the right to travel is unquestionably a right of national citizenship guaranteed by the Constitution.

Therefore, whether this right originates from the privilege and immunities provision of article IV section 2, the commerce clause, or the privilege and immunities clause of the fourteenth amendment, it is a well-settled principle of constitutional law.[101] This view was expressed in *Aptheker v. Secretary of State*[102]—which "rather clearly assimilated 'freedom of movement' into the class of 'preferred' individual liberties entitled to uniquely stringent judicial protection."[103] In his concurring opinion, Mr. Justice Douglas commented that " 'freedom of movement,' both internally and abroad, is 'deeply engrained' in our history . . . a privilege and immunity of national citizenship."[104]

However, like most rights of national citizenship, the right to travel is

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[94] *Id.* at 554-55.

[95] 357 U.S. 116 (1958).

[96] *Id.* at 125-26. This privilege also applies to the states through the fourteenth amendment. Williams v. Fears, 179 U.S. 270 (1900).

[97] Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 (1956).

[98] 357 U.S. at 126, *citing* Chafee note 97 *supra.*

[99] *See* Griswold v. Connecticut, 381 U.S. 479, 486-87 n.1 (1965).

[100] 314 U.S. 160 (1941).

[101] *See* Steinbach, *Constitutional Protection for Freedom of Movement: A Time for Decision*, 57 KY. L.J. 417 (1969); Amsterdam, *supra* note 40; Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955).

[102] 378 U.S. 500 (1964).

[103] Amsterdam, *supra* note 32, at 214.

[104] 378 U.S. 500, 519 (1964).

not absolute. There are limitations. In *Zemel v. Rusk*[105] the Supreme Court distinguished *Kent* and held that the Secretary of State could refuse to issue a passport to a citizen desiring to travel to Cuba. In *Kent* the issue was whether a citizen could be denied a passport because of his political beliefs or associations. In *Zemel* the issue was whether a citizen could be denied a passport because of foreign policy considerations affecting all citizens. The restrictions were not directed aganst a particular individual because of his personal characteristics, but rather applied to all persons in the form of a geographical limitation. Thus due process of law does not mean that the right to travel cannot be impeded under certain circumstances.[106] If the necessity for restriction is based on a compelling governmental interest then the right may be inhibited.[107]

Vagrancy orinances fall short of satisfying this "compelling governmental interest" test for two reasons: First,

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly strifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[108]

Accordingly, if there are feasible alternatives to vagrancy ordinances for effectuating the goals of crime prevention and investigation, then broadly written vagrancy laws which stifle the freedom of movement are unnecessary. Such alternatives do exist, such as the New York "Stop and Frisk" Law,[109] The Uniform Arrest Act (1941), The Model Code of Pre-Arraignment Procedure (1968), and the Model Penal Code (1962). All of these approaches are less restricting on liberty than the ordinary municipal vagrancy ordinance because they forbid arrests on mere suspicion, do not make it a crime to exercise the privilege against self-incrimination, and do not shift the burden of proof to the accused.

Second, those cases which have upheld restrictions on freedom of travel have done so because various emergency factors such as war, depression, or natural catastrophe[110] necessitated such restrictions for the public good. The asserted "compelling governmental interest" behind vagrancy laws is crime prevention.[111] Theoretically, this purpose is as valid in restricting movement as is war, depression, and natural catastrophe. However, in

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[105] 381 U.S. 1 (1965).

[106] For an excellent discussion and critique of the power of the federal government to impede travel, *see* Rauh and Pollitt, *Restrictions on the Right to Travel*, 13 W. RES. L. REV. 128 (1961).

[107] Zemel v. Rusk, 381 U.S. 1 (1965).

[108] Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964).

[109] N.Y. CODE CRIM. PROC. § 180 (1971).

[110] Zemel v. Rusk, 381 U.S. 1, 15-16 (1965).

[111] District of Columbia v. Hunt, 163 F.2d 833 (D.C. Cir. 1947); United States v. Margeson, 259 F. Supp. 256 (E.D. Pa. 1966); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. REV. 102 (1962).

order for this purpose to be valid, these laws must be shown to be effective devices in crime prevention. Yet numerous studies have revealed that "crime control, has not been shown to have the slightest relation to the class of persons whom the laws restrain. . . ."[112]

3. Freedom from Arrest and Conviction on Suspicion[113]

The Supreme Court has interpreted the Constitution to require the government to meet certain burdens of proof according to the magnitude of the deprivation of liberty to which they submit persons. For instance, a brief, temporary intrusion on the liberty of a citizen by a police officer during a "street encounter" requires the officer to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[114] As the deprivation of liberty becomes more serious, the officer's justification for his actions must be accordingly higher. Therefore when a mere "street encounter" leads to an arrest, the officer must have "probable cause," based on "facts and circumstances within [his] knowledge and of which . . . [he] had reasonable trustworthy information . . . sufficient to warrant a prudent man in believing that the [accused] had committed or was committing an offense."[115] And finally, if conviction is desired, the burden of proof must extend "beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[116]

Historically, vagrancy laws have been employed as a method of circumventing these constitutional requirements.

> The use of vagrancy arrests by the police to obtain custody of a man whom they suspect of more serious offenses but whom they cannot lawfully arrest for such offenses because there is not probable cause to support an arrest is a matter of common observation. . . .[117]

The inherent defect of suspicious person laws was most recently announced by the Ohio Supreme Court in *Columbus v. Thompson*,[118] in which the court favorably cited the Massachusetts case of *Alegata v. Commonwealth*.[119]

> Suspicion, which is an inadequate ground for arrest, is no more satisfactory

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[112] Amsterdam, *supra* note 32, at 214; *see, e.g.*, Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 625-28 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1224-25 (1953).

[113] For a more detailed analysis of this argument, *see* Amsterdam, *supra* note 32, at 227; Douglas, *supra* note 46; Foote, *supra* note 112; Lacey, *supra* note 112.

[114] Terry v. Ohio, 392 U.S. 1, 21 (1968).

[115] Beck v. Ohio, 379 U.S. 89, 91 (1970).

[116] *In re* Winship, 397 U.S. 358, 364 (1970).

[117] Amsterdam, *supra* note 32, at 226-27; *see also* Jones v. Peyton, 411 F.2d 857 (4th Cir. 1969).

[118] 25 Ohio St. 2d 26, 266 N.E.2d 571 (1971).

[119] 353 Mass. 287, 231 N.E.2d 201 (1967).

> as a basis for punishment. In holding invalid a statute authorizing arrest and prosecution of a "suspicious person" the Court of Appeals for the District of Columbia in a well considered opinion said, "Mere suspicion is no evidence of crime of any particular kind, and it forms no element in the constitution of crime. Suspicion may exist without even the knowledge of the party who is the object of the suspicion, as to the matter of which he is suspected. The suspicion may be generated in the mind of one or more persons without even colorable foundation of truth for the suspicion. *Stoutenburgh v. Frazier*, 16 App. D.C. 229, 234-235.[120]

4. Privilege Against Self-Incrimination

The "satisfactory account" requirement of the suspicious person ordinance in *Palmer*, the purpose of which is to shift the burden of proof onto the defendant, may be an encroachment on the privilege against self-incrimination.[121] The Court has held that this privilege exists where questions "are directed at a highly selective group inherently suspect of criminal activities . . . where response . . . might involve . . . the admission of a crucial element of a crime."[122] It takes little imagination to perceive that persons arrested under suspicious person ordinances satisfy these requirements.

Even though dicta in both *United States v. Miranda*[123] and *Escobedo v. Illinois*[124] may imply that neither decision intended to limit the power of the police to compel answers during street encounters (thus limiting the privilege to courtroom proceedings), more recent opinions and commentaries explicitly state that the privilege does not contain this limitation.[125]

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120 25 Ohio St. 2d 26, 32, 266 N.E.2d 571, 574 (1971).

121 However, the Court in *Palmer* did not so hold.

122 Albertson v. SACB, 382 U.S. 70, 79 (1965); *see also* Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

123 384 U.S. 436, 477 (1966):

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.

124 378 U.S. 478, 492 (1964):

> Nothing we have said today affects the powers of the police to investigate an "unsolved crime," . . . by gathering information from witnesses and by other "proper investigative efforts."

125 Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969):

> The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. . . . But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

See also Note, *Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination*, 52 CORNELL L.Q. 335, 338-40 (1967); LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968); Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465 (1967).

However, there have been other qualifications placed on the doctrine. In *Gardner v. Broderick*[126] the Court conceded that

> [a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the *compelled* testimony *or its fruits* in connection with a criminal prosecution against the person testifying.[127]

An individual arrested under a suspicious person ordinance is obviously not granted immunity from criminal prosecution, and in fact one of the primary purposes of such an arrest is to use the "fruits" of the defendant's testimony to convict him of other and more serious crimes. That is, the arrest may be an excuse to investigate the background of the accused to determine whether he shows tendencies to commit future crimes or has committed past crimes.[128]

In order to demonstrate that a person arrested for vagrancy is definitely in a "compelling" situation one need only look at the dilemma which faces the accused: if he refuses to respond, he may be arrested for violation of the ordinance; but if he does talk, he may incriminate himself because the very nature of the policeman's questions call for incriminating answers.[129]

VI. CONCLUSION

The initial purpose of this note was to consider vagrancy laws in light of the delicate balancing of the investigative powers of the police and the personal liberties of the individual. However, based on the extensive judicial criticism of vagrancy laws, there appears to be no reason to effect this balance. As they now stand, vagrancy ordinances are not only replete with constitutional infirmities, but are also overwhelmingly ineffective in attaining their asserted purpose of crime control.[130] A total rejection of vagrancy legislation is the only logical solution. In order to preserve reasonable investigative rights for law enforcement officials, vagrancy laws could be replaced by conduct-criminality laws, subjecting an individual to arrest only where the police have probable cause to believe that he has committed a specific crime.[131]

There are excellent models which the city governments could adopt to replace present vagrancy ordinances. For example, § 2 of the Uniform Arrest Act strikes a delicate balance between the powers of the police to investigate and the personal rights of the individual. It allows the police to detain suspicious persons. However, their suspicions must be based on a

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126 392 U.S. 273 (1968).

127 *Id.* at 276 (emphasis added).

128 Foote, *supra* note 112; Lacey, *supra* note 112.

129 Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433 (1967); Note, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 789-790 (1968).

130 *See* note 123 *supra.*

131 Sherry, *supra* note 72.

reasonable belief that the suspect has, is, or is about to be engaged in criminal activity. Mere suspicion is not sufficient to justify the police encounter. The Act also permits a policeman to question those individuals whom he stops and to detain those who refuse to identify themselves; however, the detention period may not exceed two hours and the detention may not be recorded as an arrest. "The two hour limitation prevents temporary detention from being transferred into imprisonment ex communicado without the safeguards of arrest and its consequent responsibilities."[132] Stigmatization and the deleterious effects of an arrest and record are also prevented by the Act.

Obviously, the first and foremost step in effectuating a revocation of present vagrancy laws must be made by the legislatures and city councils. It is unreasonable to place the burden on the courts, for this would result in extreme delays and relative lack of uniform application. Additionally, because the length of sentence and amount of the fine for violation of vagrancy laws is so paltry,[133] and because those arrested are almost exclusively the poor and uneducated,[134] the incentive for change would be minimal if left to the courts. The lawmakers must take the initiative if a change is to occur.

William A. Kurtz

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[132] Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942).

[133] For instance, the penalty for violation of the ordinances in both *Palmer* and *Coates* was a $50.00 fine and 30 days in jail.

[134] *See* note 77 *supra.*